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No. 91-1993

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CONTINENTAL CASUALTY COMPANY,
Petitioner,

v.

FIBREBOARD CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONER

PAUL M. SMITH *
JOEL I. KLEIN
RICHARD G. TARANTO
KLEIN, FARR, SMITH & TARANTO
2550 M Street, N.W.
Suite 350
Washington, D.C. 20037
(202) 775-0184

DONALD T. RAMSEY
DAVID M. RICE
CARROLL, BURDICK & MCDONOUGH
44 Montgomery Street, Suite 400
San Francisco, CA 94104
(415) 989-5900

* *Counsel of Record*

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REPLY BRIEF OF PETITIONER

Contrary to respondent's diversionary arguments, this case warrants review because of two undeniable facts. First, this Court has indicated that a central factor in due process review of choice-of-law decisions is the reasonable expectations of the parties. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 327 (1981) (Stevens, J., concurring); *id.* at 333 (Powell, J., concurring). Second, as this case illustrates, this factor is frequently ignored in the insurance-liability context: many courts are construing insurance policies under the laws of multiple states

(based on the locus of particular injuries), *see* Pet. 16-17 (citing cases), despite obvious reasons to doubt that the parties would have anticipated such an approach, *see* Pet. 17-18 (citing cases). If reasonable expectations should indeed have central importance in the due process analysis, the Court needs to reinforce that message in this case.

1. Respondent's efforts to evade further review begin with the suggestion that petitioner has raised a new issue in this Court. This suggestion is simply wrong. In the courts below, petitioner did devote much of its argument to state law, since choice-of-law questions are usually determined on that basis and since the applicable state choice-of-law principles, in its view, support application of California substantive law in this case. *See* Pet. 12-13. But petitioner also went further. In the district court, it argued that "[i]n 1957, the parties would reasonably have expected that California law would govern any contract dispute under traditional conflicts principles then in force." Mem. in Support of Summary Judgment at 11. It also relied on the Fifth Circuit's recent holding that application of Texas law to a dispute between an out-of-state insurer and an out-of-state insured over a loss in Texas "would raise serious questions of constitutionality under the . . . due process clause of the fourteenth amendment." *W.R. Grace & Co. v. Continental Cas. Co.*, 896 F.2d 865, 883 (5th Cir. 1990) (*per curiam* opinion on petition for rehearing) (quoted in Mem. in Support of Summary Judgment at 17-18).

In the Ninth Circuit, petitioner then devoted an entire section of its brief to the proposition that "The District Court's Application of Texas Law Violates Continental's Due Process Rights Because it Frustrates the Justifiable Expectations of the Parties." Appellant's Br. at 37.[1] Respondent now characterizes this argument as "almost . . . an afterthought," Br. in Opp. at 10, and makes the inex-

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[1] Respondent never argued in the court of appeals that this issue was not properly preserved.

plicable claim that this argument is somehow different from the one presented here, *id.* In fact, however, petitioner's brief in the court of appeals relied on the same language in *Shutts* and *Allstate* that is cited here, for precisely the same purpose. There is thus no basis for the suggestion that Continental has now invented some new federal claim.[2]

2. Respondent also makes the hyperbolic claim that petitioner's constitutional analysis, based on the parties' reasonable expectations, would "outlaw interest balancing in choice of law as violative of due process." Br. in Opp. at 14. This is plainly incorrect. If parties entered into a contract at a time when interest balancing was the applicable approach to choice of law in states that might construe the contract, then such an approach would be wholly consonant with their expectations and would raise no constitutional concerns.

Here, however, as we have shown, we are dealing with a contract dating from 1957, when the traditional *lex loci* approach to choice of law was essentially universal. Petitioner's argument would indeed prevent departure from this traditional approach with respect to contracts *dating from this time period*, but that is simply a consequence of the need to respect parties' reasonable expectations. States would of course remain free to apply more recent approaches in cases where the parties cannot claim reliance on the traditional rule.

Respondent also suggests that any reliance on application of the law of the state where this contract was made and performed was misplaced even in 1957. Its sole support for this assertion, however, is the decision in

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[2] It is true that the Ninth Circuit, by choosing to affirm on the opinion below, avoided addressing this constitutional issue, but this hardly means that petitioner is barred from pursuing the issue here. Nor does it mean that the case would provide an inappropriate vehicle for clarifying the applicable principles of constitutional law.

Watson v. Employers Liab. Assur. Corp., 348 U.S. 66 (1954), where this Court had upheld the constitutionality of a state *statute* mandating a narrow procedural exception to the *lex loci* doctrine—*i.e.*, authorizing accident victims to sue insurers directly despite contrary contractual language. As noted in the petition, Pet. 14, the Court had already drawn a distinction between contractual provisions governing "remedies and procedure," which the forum state could disregard, and provisions involving "rights and obligations" (such as the extent of the "risk" being insured), which were governed by the law of the state where the contract was made or performed. *Home Ins. Co. v. Dick*, 281 U.S. 397, 409-10 (1930). It is thus spurious to argue that *Watson* put anyone on notice that issues in the latter category might not be adjudicated in accordance with the *lex loci* doctrine.[3] And it is even more spurious to suggest that post-1957 decisions of this Court provided the requisite notice. *See* Br. in Opp. at 20-23.

3. Finally, respondent argues that petitioner should have known in 1957 that, even under California law, it was providing protection against the risk of punitive damages resulting from conduct that was wantonly reckless but not intentional. Br. in Opp. at 23-27. It does so by misstating the law as it then stood. In 1957, it was clear that California law limited punitive damages to cases involving "malice," *i.e.*, "an intent to vex, annoy or injure." *Gombos v. Ashe*, 322 P.2d 933, 939 (Cal. App. 1958) (citing 14 Cal. Jur. 2d § 176, at 810). *See also City Products Corp. v. Globe Indem. Co.*, 88 Cal. App. 3d 31, 41, 151 Cal.

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[3] The only other pre-1957 case cited by respondent is *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313 (1943). *See* Br. in Opp. at 20. There the Court simply held that it was constitutional for New York to regulate insurance associations selling policies to New York residents covering New York property, even though the policies were executed elsewhere. It reasoned that the associations were doing business in New York and thus subject to general regulation. This decision said nothing about the constitutionality of construing insurance *policies* under the law of a state where the policies were neither made nor performed.

Rptr. 494, 500 (1979) (same). At that time, as now, insurance coverage for such an intentional act was expressly barred by statute. Cal. Ins. Code § 533 (West 1972). Petitioner thus had no reason to believe that it might be liable for punitive damages under this California insurance policy.

Much later, the law in California changed to allow punitive damages for acts involving "conscious disregard of the safety of others." *See Peterson v. Superior Court*, 642 P.2d 1305, 1312 (Cal. 1982). But that state simultaneously recognized that insurance coverage for punitive damages in such cases should still be barred as against public policy. *See id.* at 1310. This evolution hardly undermines petitioner's argument that (1) it reasonably expected the application of California law in 1957 and (2) it reasonably understood California law at that time to bar coverage for punitive damages. Nor does it suggest any reason why it would be fair now to apply the law of some other state and thereby create an obligation to indemnify respondent for punitive damages that was never part of the original deal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL M. SMITH *
JOEL I. KLEIN
RICHARD G. TARANTO
KLEIN, FARR, SMITH & TARANTO
2550 M Street, N.W.
Suite 350
Washington, D.C. 20037
(202) 775-0184

DONALD T. RAMSEY
DAVID M. RICE
CARROLL, BURDICK & MCDONOUGH
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San Francisco, CA 94104
(415) 989-5900

* *Counsel of Record*